

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

BANK OF AMERICA, N.A.,

Case No. 2:16-CV-540 JCM (NJK)

Plaintiff(s),

ORDER

V.

MOUNTAIN GATE HOMEOWNERS
ASSOCIATION, et al.,

Defendant(s).

Presently before the court is plaintiff Bank of America, N.A., successor by merger to BAC Home Loans Servicing, LP, f/k/a Countrywide Home Loans Servicing LP's ("BANA") motion for summary judgment. (ECF No. 65). Defendant Saticoy Bay LLC Series 6408 Hillside Brook ("Saticoy Bay") filed a response (ECF No. 72), to which BANA replied 74).

Also before the court Saticoy Bay's motion for summary judgment. (ECF No. 66). BANA filed a response (ECF No. 70), to which Saticoy Bay replied (ECF No. 75).

Also before the court is Mountain Gate Homeowners' Association's (the "HOA") motion for summary judgment. (ECF No. 67). BANA filed a response (ECF No. 71), to which the HOA replied (ECF No. 76).

I. Facts

This case involves a dispute over real property located at 6408 Hillside Brook Avenue, Las Vegas, Nevada 89130 (the “property”).

On November 11, 2009, Laura Greco obtained a loan in the amount of \$93,279.00, which was secured by a deed of trust recorded on December 21, 2009. (ECF No. 1). The note and the deed were insured by Federal Housing Administration (“FHA”). (ECF No. 1).

1 On October 1, 2010, defendant Hampton & Hampton Collections, LLC (“H&H”), acting
2 on behalf of defendant Mountain Gate Homeowners’ Association (the “HOA”), recorded a notice
3 of delinquent assessment lien, stating an amount due of \$998.00. (ECF No. 1 at 4). On February
4 28, 2011, H&H recorded a notice of default and election to sell to satisfy the delinquent assessment
5 lien, stating an amount due of \$957.00. (ECF No. 1 at 4).

6 The deed of trust was assigned to BANA via an assignment deed dated March 32, 2012.
7 (ECF No. 1).

8 On March 27, 2014, H&H provided a ledger identifying the amount due for nine months
9 of assessments on the property to be \$765.00 to BANA at BANA’s request. (ECF No. 1 at 5).
10 The March 27th letter provided that the amount may not include all fees and costs and that “[y]ou
11 must contact the management company directly for these additional amounts.” (ECF No. 1-1 at
12 2). On April 10, 2014, BANA tendered payment to H&H in the amount of \$765.00, of which
13 H&H confirmed receipt on April 11, 2014. (ECF No. 1 at 5–6).

14 On July 9, 2014, H&H recorded a notice of trustee’s sale, stating an amount due of
15 \$3,306.50. (ECF No. 1 at 4). On August 20, 2014, defendant Saticoy Bay LLC series 6408
16 Hillside Brook (“Saticoy”) purchased the property at the foreclosure sale for \$21,100.00. (ECF
17 No. 1 at 6). A trustee’s deed upon sale in favor of Saticoy was recorded on December 3, 2014.
18 (ECF No. 1 at 6).

19 On March 10, 2016, BANA filed the underlying complaint, alleging four causes of action:
20 (1) quiet title/declaratory judgment against all defendants; (2) breach of NRS 116.1113 against
21 H&H and the HOA; (3) wrongful foreclosure against H&H and the HOA; and (4) injunctive relief
22 against Saticoy. (ECF No. 1).

23 On April 1, 2016, Saticoy Bay filed a counterclaim against BANA for quiet title and
24 declaratory relief. (ECF No. 6).

25 In the instant motions, BANA, Saticoy Bay, and the HOA all move for summary judgment
26 pursuant to Federal Rule of Civil Procedure 56. (ECF Nos. 65, 66, 67).

27 ...

28 ...

1 **II. Legal Standard**

2 The Federal Rules of Civil Procedure allow summary judgment when the pleadings,
3 depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,
4 show that “there is no genuine dispute as to any material fact and the movant is entitled to a
5 judgment as a matter of law.” Fed. R. Civ. P. 56(a). A principal purpose of summary judgment is
6 “to isolate and dispose of factually unsupported claims.” *Celotex Corp. v. Catrett*, 477 U.S. 317,
7 323–24 (1986).

8 For purposes of summary judgment, disputed factual issues should be construed in favor
9 of the non-moving party. *Lujan v. Nat'l Wildlife Fed.*, 497 U.S. 871, 888 (1990). However, to be
10 entitled to a denial of summary judgment, the nonmoving party must “set forth specific facts
11 showing that there is a genuine issue for trial.” *Id.*

12 In determining summary judgment, a court applies a burden-shifting analysis. The moving
13 party must first satisfy its initial burden. “When the party moving for summary judgment would
14 bear the burden of proof at trial, it must come forward with evidence which would entitle it to a
15 directed verdict if the evidence went uncontested at trial. In such a case, the moving party has
16 the initial burden of establishing the absence of a genuine issue of fact on each issue material to
17 its case.” *C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000)
18 (citations omitted).

19 By contrast, when the nonmoving party bears the burden of proving the claim or defense,
20 the moving party can meet its burden in two ways: (1) by presenting evidence to negate an essential
21 element of the non-moving party’s case; or (2) by demonstrating that the nonmoving party failed
22 to make a showing sufficient to establish an element essential to that party’s case on which that
23 party will bear the burden of proof at trial. *See Celotex Corp.*, 477 U.S. at 323–24. If the moving
24 party fails to meet its initial burden, summary judgment must be denied and the court need not
25 consider the nonmoving party’s evidence. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159–
26 60 (1970).

27 If the moving party satisfies its initial burden, the burden then shifts to the opposing party
28 to establish that a genuine issue of material fact exists. *See Matsushita Elec. Indus. Co. v. Zenith*

1 *Radio Corp.*, 475 U.S. 574, 586 (1986). To establish the existence of a factual dispute, the
2 opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient
3 that “the claimed factual dispute be shown to require a jury or judge to resolve the parties’ differing
4 versions of the truth at trial.” *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626,
5 631 (9th Cir. 1987).

6 In other words, the nonmoving party cannot avoid summary judgment by relying solely on
7 conclusory allegations that are unsupported by factual data. *See Taylor v. List*, 880 F.2d 1040,
8 1045 (9th Cir. 1989). Instead, the opposition must go beyond the assertions and allegations of the
9 pleadings and set forth specific facts by producing competent evidence that shows a genuine issue
10 for trial. *See Celotex*, 477 U.S. at 324.

11 At summary judgment, a court’s function is not to weigh the evidence and determine the
12 truth, but to determine whether there is a genuine issue for trial. *See Anderson v. Liberty Lobby,*
13 *Inc.*, 477 U.S. 242, 249 (1986). The evidence of the nonmovant is “to be believed, and all
14 justifiable inferences are to be drawn in his favor.” *Id.* at 255. But if the evidence of the
15 nonmoving party is merely colorable or is not significantly probative, summary judgment may be
16 granted. *See id.* at 249–50.

17 **III. Discussion¹**

18 Under Nevada law, “[a]n action may be brought by any person against another who claims
19 an estate or interest in real property, adverse to the person bringing the action for the purpose of
20 determining such adverse claim.” Nev. Rev. Stat. § 40.010. “A plea to quiet title does not require
21 any particular elements, but each party must plead and prove his or her own claim to the property
22 in question and a plaintiff’s right to relief therefore depends on superiority of title.” *Chapman v.*
23 *Deutsche Bank Nat’l Trust Co.*, 302 P.3d 1103, 1106 (Nev. 2013) (citations and internal quotation
24 marks omitted). Therefore, for plaintiff to succeed on its quiet title action, it needs to show that

25
26 ¹ As an initial matter, the court takes judicial notice of the following recorded documents:
27 first deed of trust (ECF No. 66-3); notice of delinquent assessment (ECF No. 78, exh. 5); notice of
28 default and election to sell (ECF No. 66-6); notice of trustee’s sale (ECF No. 66-9); trustee’s deed
upon sale (ECF No. 66-2); and assignment of deed of trust (ECF No. 66-4). *See, e.g., United States*
v. Corinthian Colls., 655 F.3d 984, 998–99 (9th Cir. 2011) (holding that a court may take judicial
notice of public records if the facts noticed are not subject to reasonable dispute); *Intri-Plex Tech.,*
Inv. v. Crest Grp., Inc., 499 F.3d 1048, 1052 (9th Cir. 2007).

1 its claim to the property is superior to all others. *See also Breliant v. Preferred Equities Corp.*,
2 918 P.2d 314, 318 (Nev. 1996) (“In a quiet title action, the burden of proof rests with the plaintiff
3 to prove good title in himself.”).

4 **A. Deed Recitals²**

5 Section 116.3116(1) of the Nevada Revised Statutes gives an HOA a lien on its
6 homeowners’ residences for unpaid assessments and fines; moreover, NRS 116.3116(2) gives
7 priority to that HOA lien over all other liens and encumbrances with limited exceptions—such as
8 “[a] first security interest on the unit recorded before the date on which the assessment sought to
9 be enforced became delinquent.” Nev. Rev. Stat. § 116.3116(2)(b).

10 The statute then carves out a partial exception to subparagraph (2)(b)’s exception for first
11 security interests. *See* Nev. Rev. Stat. § 116.3116(2). In *SFR Investment Pool 1 v. U.S. Bank*, the
12 Nevada Supreme Court provided the following explanation:

13 As to first deeds of trust, NRS 116.3116(2) thus splits an HOA lien into two pieces,
14 a superpriority piece and a subpriority piece. The superpriority piece, consisting of
15 the last nine months of unpaid HOA dues and maintenance and nuisance-abatement
charges, is “prior to” a first deed of trust. The subpriority piece, consisting of all
other HOA fees or assessments, is subordinate to a first deed of trust.

16 334 P.3d 408, 411 (Nev. 2014) (“*SFR Investments*”).

17 Chapter 116 of the Nevada Revised Statutes permits an HOA to enforce its superpriority
18 lien by nonjudicial foreclosure sale. *Id.* at 415. Thus, “NRS 116.3116(2) provides an HOA a true
19 superpriority lien, proper foreclosure of which will extinguish a first deed of trust.” *Id.* at 419; *see also* Nev. Rev. Stat. § 116.31162(1) (providing that “the association may foreclose its lien by sale”
20 upon compliance with the statutory notice and timing rules).

21 Subsection (1) of NRS 116.31166 provides that the recitals in a deed made pursuant to
22 NRS 116.31164 of the following are conclusive proof of the matters recited:

- 23
- 24 (a) Default, the mailing of the notice of delinquent assessment, and the recording
25 of the notice of default and election to sell;
26 (b) The elapsing of the 90 days; and
27 (c) The giving of notice of sale[.]
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² The 2015 Legislature revised Chapter 116 substantially. 2015 Nev. Stat., ch. 266. Except where otherwise indicated, the references in this order to statutes codified in NRS Chapter 116 are to the version of the statutes in effect in 2010–14, when the events giving rise to this litigation occurred.

1 Nev. Rev. Stat. § 116.31166(1)(a)–(c).³ “The ‘conclusive’ recitals concern default, notice, and
2 publication of the [notice of sale], all statutory prerequisites to a valid HOA lien foreclosure sale
3 as stated in NRS 116.31162 through NRS 116.31164, the sections that immediately precede and
4 give context to NRS 116.31166.” *Shadow Wood Homeowners Assoc. v. N.Y. Cnty. Bancorp., Inc.*,
5 366 P.3d 1105 (Nev. 2016) (“*Shadow Wood*”). Nevertheless, courts retain the equitable authority
6 to consider quiet title actions when a HOA’s foreclosure deed contains statutorily conclusive
7 recitals. *See id.* at 1112.

8 Here, Saticoy Bay has provided the recorded trustee’s deed upon sale, the recorded notice
9 of delinquent assessment, the recorded notice of default and election to sell, and the recorded notice
10 of trustee’s sale. (ECF No. 66). Pursuant to NRS 116.31166, these recitals in the recorded
11 foreclosure deed are conclusive to the extent that they implicate compliance with NRS 116.31162
12 through NRS 116.31164, which provide the statutory prerequisites of a valid foreclosure. *See id.*
13 at 1112 (“[T]he recitals made conclusive by operation of NRS 116.31166 implicate compliance
14 only with the statutory prerequisites to foreclosure.”). Therefore, pursuant to NRS 116.31166 and
15 the recorded foreclosure deed, the foreclosure sale is valid to the extent that it complied with NRS
16 116.31162 through NRS 116.31164.

17 Importantly, while NRS 116.3116 accords certain deed recitals conclusive effect—*e.g.*,
18 default, notice, and publication of the notice of sale—it does not conclusively, as a matter of law,
19

20 ³ The statute further provides as follows:
21

22 2. Such a deed containing those recitals is conclusive against the unit's
23 former owner, his or her heirs and assigns, and all other persons. The receipt for the
24 purchase money contained in such a deed is sufficient to discharge the purchaser
from obligation to see to the proper application of the purchase money.

25 3. The sale of a unit pursuant to NRS 116.31162, 116.31163 and 116.31164
26 vests in the purchaser the title of the unit's owner without equity or right of
27 redemption.

28 Nev. Rev. Stat. § 116.31166(2)–(3).

1 entitle Saticoy Bay to success on its quiet title claim. *See Shadow Wood*, 366 P.3d at 1112
2 (rejecting contention that NRS 116.31166 defeats, as a matter of law, action to quiet title). Thus,
3 the question remains whether defendants have demonstrated sufficient grounds to justify setting
4 aside the foreclosure sale. *See id.* “When sitting in equity . . . courts must consider the entirety of
5 the circumstances that bear upon the equities. This includes considering the status and actions of
6 all parties involved, including whether an innocent party may be harmed by granting the desired
7 relief.” *Id.*

8 **B. Rejected Tender**

9 BANA asserts that pursuant to the March 27th ledger, the amount due for monthly
10 assessments from January 1 to September 1, 2014, was \$765.00. (ECF No. 65 at 4). BANA
11 remitted a check for \$765.00 to H&H on April 10, 2014. (ECF No. 65 at 4). BANA argues that
12 H&H wrongfully rejected BANA’s tender of the superpriority lien. (ECF No. 65 at 3).

13 Under NRS 116.31166(1), the holder of a first deed of trust may pay off the superpriority
14 portion of an HOA lien to prevent the foreclosure sale from extinguishing that security interest.
15 *See Nev. Rev. Stat. § 116.31166(1); see also SFR Investments*, 334 P.3d at 414 (“But as a junior
16 lienholder, U.S. Bank could have paid off the SHHOA lien to avert loss of its security”); *see*
17 *also, e.g., 7912 Limbwood Ct. Trust v. Wells Fargo Bank, N.A., et al.*, 979 F. Supp. 2d 1142, 1149
18 (D. Nev. 2013) (“If junior lienholders want to avoid this result, they readily can preserve their
19 security interests by buying out the senior lienholder’s interest.” (citing *Carillo v. Valley Bank of*
20 *Nev.*, 734 P.2d 724, 725 (Nev. 1987); *Keever v. Nicholas Beers Co.*, 611 P.2d 1079, 1083 (Nev.
21 1980))).

22 The superpriority lien portion, however, consists of “the last nine months of unpaid HOA
23 dues **and maintenance and nuisance-abatement charges**,” while the subpriority piece consists of
24 “all other HOA fees or assessments.” *SFR Investments*, 334 P.3d at 411 (emphasis added); *see*
25 *also 7912 Limbwood Ct. Trust*, 979 F. Supp. 2d at 1150 (“The superpriority lien consists only of
26 unpaid assessments and certain charges specifically identified in § 116.31162.”).

27 The notice of default recorded on February 28, 2011, set forth an amount due of \$957.00.
28 BANA merely presumed, without adequate support, that paying \$765.00 was sufficient to preserve

1 its interest in the property. *See generally*, e.g., Nev. Rev. Stat. § 107.080 (allowing trustee's sale
2 under a deed of trust only when a subordinate interest has failed to make good the deficiency in
3 performance or payment for 35 days); Nev. Rev. Stat. § 40.430 (barring judicially ordered
4 foreclosure sale if the deficiency is made good at least 5 days prior to sale).

5 Rather than tendering the \$957.00 due so as to preserve its interest in the property and then
6 later seeking a refund of any difference, BANA elected to pay a lesser amount based on the
7 assumption that it merely had to pay the nine months' worth of assessment fees to preserve its
8 interest in the property. *See SFR Investments*, 334 P.3d at 418 (noting that the deed of trust holder
9 can pay the entire lien amount and then sue for a refund). Had BANA paid the amount set forth
10 in the notice of default (\$957.00), the HOA's interest would have been subordinate to the first deed
11 of trust. *See* Nev. Rev. Stat. § 116.31166(1).

12 After failing to use the legal remedies available to BANA to prevent the property from
13 being sold to a third party—for example, seeking a temporary restraining order and preliminary
14 injunction and filing a *lis pendens* on the property (*see* Nev. Rev. Stat. §§ 14.010, 40.060)—
15 BANA now seeks to profit from its own failure to follow the rules set forth in the statutes. *See*
16 *generally*, e.g., *Barkley's Appeal. Bentley's Estate*, 2 Monag. 274, 277 (Pa. 1888) (“In the case
17 before us, we can see no way of giving the petitioner the equitable relief she asks without doing
18 great injustice to other innocent parties who would not have been in a position to be injured by
19 such a decree as she asks if she had applied for relief at an earlier day.”); *Nussbaumer v. Superior
20 Court in & for Yuma Cty.*, 489 P.2d 843, 846 (Ariz. 1971) (“Where the complaining party has
21 access to all the facts surrounding the questioned transaction and merely makes a mistake as to the
22 legal consequences of his act, equity should normally not interfere, especially where the rights of
23 third parties might be prejudiced thereby.”).

24 In presuming that an “offer” to pay constitutes a “tender” of payment, BANA cites to *Stone*
25 *Hollow Ave. Trust v. Bank of Am., Nat'l Ass'n*, 382 P.3d 911 (Nev. 2016), for the proposition that
26 an offer to pay the superpriority amount prior to the foreclosure sale preserves the lender's deed
27 of trust. (ECF No. 65 at 5–7).

28

1 The *Stone Hollow* court, however, made no such holding. To the contrary, the *Stone*
2 *Hollow* court held that “[w]hen rejection of a tender is unjustified, the tender is effective to
3 discharge the lien.” 382 P.3d at 911. BANA merely attempted to tender \$765.00 rather than the
4 amount set forth in the notice of default (\$957.00) and has not set forth any evidence as to a tender
5 in a sufficient amount.

6 Based on the foregoing, BANA has failed to sufficiently establish that it tendered any
7 amount prior to the foreclosure sale so as to render Saticoy Bay’s title subject to BANA’s deed of
8 trust.

9 **C. Due Process**

10 BANA argues that the HOA lien statute is facially unconstitutional because it does not
11 mandate notice to deed of trust beneficiaries. (ECF No. 65 at 9–12). BANA further contends that
12 any factual issues concerning actual notice is irrelevant pursuant to *Bourne Valley Court Trust v.*
13 *Wells Fargo Bank, N.A.*, 832 F.3d 1154 (9th Cir. 2016) (“*Bourne Valley*”). (ECF No. 65 at 9–12).

14 The Ninth Circuit held that NRS 116.3116’s “opt-in” notice scheme, which required a
15 HOA to alert a mortgage lender that it intended to foreclose only if the lender had affirmatively
16 requested notice, facially violated mortgage lenders’ constitutional due process rights. *Bourne*
17 *Valley*, 832 F.3d at 1157–58. The facially unconstitutional provision, as identified in *Bourne*
18 *Valley*, exists in NRS 116.31163(2). *See id.* at 1158. At issue is the “opt-in” provision that
19 unconstitutionally shifts the notice burden to holders of the property interest at risk. *See id.*

20 To state a procedural due process claim, defendants must allege “(1) a deprivation of a
21 constitutionally protected liberty or property interest, and (2) a denial of adequate procedural
22 protections.” *Brewster v. Bd. of Educ. of Lynwood Unified Sch. Dist.*, 149 F.3d 971, 982 (9th Cir.
23 1998). Defendants have satisfied the first element as a deed of trust is a property interest under
24 Nevada law. *See Nev. Rev. Stat. § 107.020 et seq.; see also Mennonite Bd. of Missions v. Adams*,
25 462 U.S. 791, 798 (1983) (stating that “a mortgagee possesses a substantial property interest that
26 is significantly affected by a tax sale”). However, defendants fail on the second prong.

27 Due process does not require actual notice. *Jones v. Flowers*, 547 U.S. 220, 226 (2006).
28 Rather, it requires notice “reasonably calculated, under all the circumstances, to apprise interested

1 parties of the pendency of the action and afford them an opportunity to present their objections.”
2 *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *see also Bourne Valley*,
3 832 F.3d at 1158.

4 Here, adequate notice was given to the interested parties prior to extinguishing a property
5 right. H&H recorded the notice of trustee’s sale (ECF No. 66-9) and sent copies by certified mail
6 to all interested parties including BANA (ECF No. 69-10).

7 As a result, the notice of trustee’s sale was sufficient notice to cure any constitutional defect
8 inherent in NRS 116.31163(2) as it put BANA on notice that its interest was subject to pendency
9 of action and offered all of the required information. Thus, BANA’s motion for summary
10 judgment will be denied as to this issue.

11 **D. Supremacy Clause**

12 BANA argues that the HOA lien statute cannot interfere with the federal mortgage
13 insurance program or extinguish mortgage interests insured by the FHA. (ECF No. 65 at 12–18).

14 The single-family mortgage insurance program allows FHA to insure private loans,
15 expanding the availability of mortgages to low-income individuals wishing to purchase homes.
16 *See Sec’y of Hous. & Urban Dev. v. Sky Meadow Ass’n*, 117 F. Supp. 2d 970, 980–81 (C.D. Cal.
17 2000) (discussing program); *W Wash. & Sandhill Homeowners Ass’n v. Bank of Am., N.A.*, No.
18 2:13-cv-01845-GMN-GWF, 2014 WL 4798565, at *1 n.2 (D. Nev. Sept. 25, 2014) (same). If a
19 borrower under this program defaults, the lender may foreclose on the property, convey title to
20 HUD, and submit an insurance claim. 24 C.F.R. § 203.355. HUD’s property disposition program
21 generates funds to finance the program. *See* 24 C.F.R. § 291.1.

22 Allowing an HOA foreclosure to wipe out a first deed of trust on a federally-insured
23 property thus interferes with the purposes of the FHA insurance program. Specifically, it hinders
24 HUD’s ability to recoup funds from insured properties. As this court previously stated in
25 *SaticoyBayLLC, Series 7342 Tanglewood Park v. SRMOF II 2012-1 Trust*, the court reads the
26 foregoing precedent to indicate that a homeowners’ association foreclosure sale under NRS
27 116.3116 may not extinguish a federally-insured loan. No. 2:13-CV-1199 JCM (VCF), 2015 WL
28 1990076, at *4 (D. Nev. Apr. 30, 2015).

1 However, the instant case is distinguishable from these cases in that, here, FHA is not a
2 named party. The complaint nor the counterclaim seeks to quiet title against FHA. Further,
3 Saticoy Bay's quiet title claim does not seek declaratory relief against FHA, but only as to BANA.
4 Thus, this argument provides no support for BANA as the outcome of the instant case has no
5 bearing on FHA's ability to quiet title.

6 **E. Commercial Reasonability**

7 BANA contends that judgment in its favor is appropriate because the sale of the property
8 for less than 20% its fair market value is grossly inadequate as a matter of law. (ECF No. 65 at
9 18–21). BANA further argues that the *Shadow Wood* court adopted the restatement approach,
10 quoting the opinion as holding that “[w]hile gross inadequacy cannot be precisely defined in terms
11 of a specific percentage of fair market value, generally a court is warranted in invalidating a sale
12 where the price is less than 20 percent of fair market value.” (ECF No. 65 at 19) (emphasis
13 omitted).

14 NRS 116.3116 codifies the Uniform Common Interest Ownership Act (“UCIOA”) in
15 Nevada. *See* Nev. Rev. Stat. § 116.001 (“This chapter may be cited as the Uniform Common-
16 Interest Ownership Act”); *see also SFR Investments*, 334 P.3d at 410. Numerous courts have
17 interpreted the UCIOA and NRS 116.3116 as imposing a commercial reasonableness standard on
18 foreclosure of association liens.⁴

19 In *Shadow Wood*, the Nevada Supreme Court held that an HOA's foreclosure sale may be
20 set aside under a court's equitable powers notwithstanding any recitals on the foreclosure deed
21 where there is a “grossly inadequate” sales price and “fraud, unfairness, or oppression.” 366 P.3d

22 ⁴ *See, e.g., Bayview Loan Servicing, LLC v. Alessi & Koenig, LLC*, 962 F. Supp. 2d 1222, 1229
23 (D. Nev. 2013) (“[T]he sale for \$10,000 of a Property that was worth \$176,000 in 2004, and which
24 was probably worth somewhat more than half as much when sold at the foreclosure sale, raises
25 serious doubts as to commercial reasonableness.”); *SFR Investments*, 334 P.3d at 418 n.6 (noting
26 bank's argument that purchase at association foreclosure sale was not commercially reasonable);
27 *Thunder Props., Inc. v. Wood*, No. 3:14-cv-00068-RCJ-WGC, 2014 WL 6608836, at *2 (D. Nev.
28 Nov. 19, 2014) (concluding that purchase price of “less than 2% of the amounts of the deed of
trust” established commercial unreasonableness “almost conclusively”); *Rainbow Bend
Homeowners Ass'n v. Wilder*, No. 3:13-cv-00007-RCJ-VPC, 2014 WL 132439, at *2 (D. Nev.
Jan. 10, 2014) (deciding case on other grounds but noting that “the purchase of a residential
property free and clear of all encumbrances for the price of delinquent HOA dues would raise
grave doubts as to the commercial reasonableness of the sale under Nevada law”); *Will v. Mill
Condo. Owners' Ass'n*, 848 A.2d 336, 340 (Vt. 2004) (discussing commercial reasonableness
standard and concluding that “the UCIOA does provide for this additional layer of protection”).

1 at 1110; *see also Nationstar Mortg., LLC v. SFR Invs. Pool 1, LLC*, 184 F. Supp. 3d 853, 857–58
2 (D. Nev. 2016). In other words, “demonstrating that an association sold a property at its
3 foreclosure sale for an inadequate price is not enough to set aside that sale; there must also be a
4 showing of fraud, unfairness, or oppression.” *Id.* at 1112; *see also Long v. Towne*, 639 P.2d 528,
5 530 (Nev. 1982) (“Mere inadequacy of price is not sufficient to justify setting aside a foreclosure
6 sale, absent a showing of fraud, unfairness or oppression.” (citing *Golden v. Tomiyasu*, 387 P.2d
7 989, 995 (Nev. 1963) (stating that, while a power-of-sale foreclosure may not be set aside for mere
8 inadequacy of price, it may be if the price is grossly inadequate and there is “in addition proof of
9 some element of fraud, unfairness, or oppression as accounts for and brings about the inadequacy
10 of price” (internal quotation omitted)))).

11 Despite BANA’s assertion to the contrary, the *Shadow Wood* court did not adopt the
12 restatement. In fact, nothing in *Shadow Wood* suggests that the Nevada Supreme Court’s adopted,
13 or had the intention to adopt, the restatement. *Compare Shadow Wood*, 366 P.3d at 1112–13 (citing
14 the restatement as secondary authority to warrant use of the 20% threshold test for grossly
15 inadequate sales price), *with St. James Village, Inc. v. Cunningham*, 210 P.3d 190, 213 (Nev. 2009)
16 (explicitly adopting § 4.8 of the Restatement in specific circumstances); *Foster v. Costco*
17 *Wholesale Corp.*, 291 P.3d 150, 153 (Nev. 2012) (“[W]e adopt the rule set forth in the Restatement
18 (Third) of Torts: Physical and Emotional Harm section 51.”); *Cucinotta v. Deloitte & Touche,*
19 *LLP*, 302 P.3d 1099, 1102 (Nev. 2013) (affirmatively adopting the Restatement (Second) of Torts
20 section 592A). Because Nevada courts have not adopted the relevant section(s) of the restatement
21 at issue here, the *Long* test, which requires a showing of fraud, unfairness, or oppression in addition
22 to a grossly inadequate sale price to set aside a foreclosure sale, controls. *See* 639 P.2d at 530.

23 Nevada has not clearly defined what constitutes “unfairness” in determining commercial
24 reasonableness. The few Nevada cases that have discussed commercial reasonableness state,
25 “every aspect of the disposition, including the method, manner, time, place, and terms, must be
26 commercially reasonable.” *Levers v. Rio King Land & Inv. Co.*, 560 P.2d 917, 920 (Nev. 1977).
27 This includes “quality of the publicity, the price obtained at the auction, [and] the number of
28

1 bidders in attendance.” *Dennison v. Allen Grp. Leasing Corp.*, 871 P.2d 288, 291 (Nev. 1994)
2 (citing *Savage Constr. v. Challenge-Cook*, 714 P.2d 573, 574 (Nev. 1986)).

3 Nevertheless, BANA fails to set forth sufficient evidence to show fraud, unfairness, or
4 oppression so as to justify the setting aside of the foreclosure sale. BANA relies on its repeated
5 assertion that it tendered the superpriority amount to show fraud, unfairness, or oppression.
6 However, as the discussed in the previous section, the amount due on the date of BANA’s letter
7 was set forth in the notice of default, specifically, \$957.00. Rather than tendering the noticed
8 amount under protest so as to preserve its interest and then later seeking a refund of the difference
9 in dispute, BANA chose to tender a lesser, insufficient amount.

10 **F. Bona Fide Purchaser Status**

11 BANA contends that Saticoy Bay cannot qualify as a bona fide purchaser because it had
12 knowledge of the deed of trust and inquiry notice of BANA’s superpriority tender. (ECF No. 65
13 at 21–24).

14 The issue of bona fide purchaser (“BFP”) status is distinct from that of the conclusiveness
15 of deed recitals. Specifically, the issue of BFP status concerns a buyer’s knowledge of competing
16 interests, whereas the other concerns a statutory presumption that can be equitably overcome under
17 *Shadow Wood*. See, e.g., *Nationstar Mortg., LLC*, 184 F. Supp. 3d at 859–60.

18 A BFP is a person who purchases real property “for a valuable consideration and without
19 notice of the prior equity, and without notice of facts which upon diligent inquiry would be
20 indicated and from which notice would be imputed to him, if he failed to make such inquiry.”
21 *Bailey v. Butner*, 176 P.2d 226, 234 (Nev. 1947) (emphasis omitted); see also *Moore v. De
22 Bernardi*, 220 P. 544, 547 (Nev. 1923) (“The decisions are uniform that the bona fide purchaser
23 of a legal title is not affected by any latent equity founded either on a trust, [e]ncumbrance, or
24 otherwise, of which he has no notice, actual or constructive.”). Under Nevada law, “bona fide
25 purchaser” means as follows:

26 Any purchaser who purchases an estate or interest in any real property in good faith
27 and for valuable consideration and who does not have actual knowledge,
28 constructive notice of, or reasonable cause to know that there exists a defect in, or
adverse rights, title or interest to, the real property is a bona fide purchaser.

1 Nev. Rev. Stat. § 111.180(1). In other words, a later-obtained interest can prevail over an earlier-
2 obtained interest where the later purchaser has no knowledge of the previous interest and records
3 his/her interest first. *See Nationstar Mortg., LLC*, 184 F. Supp. 3d at 860.

4 As previously discussed, BANA made no such sufficient tender. Moreover, BANA offers
5 no evidence to support its assertion that knowledge of its deed of trust is sufficient to divest Saticoy
6 Bay of bona fide purchaser status. Further, BANA offers no evidence to show that Saticoy Bay
7 had any notice that the deed of trust would not be extinguished by the foreclosure sale—for
8 example, evidence showing Saticoy Bay had notice of BANA’s full tender, had BANA actually
9 tendered the amount due.

10 **G. Retroactivity**

11 BANA contends that *SFR Investments* should not be applied retroactively to extinguish the
12 first deed of trust. (ECF No. 65 at 24–25).

13 The Nevada Supreme Court has since applied the *SFR Investments* holding in numerous
14 cases that challenged pre-*SFR Investments* foreclosure sales. *See, e.g., Centeno v. Mortg. Elec.*
15 *Registration Sys., Inc.*, No. 64998, 2016 WL 3486378, at *2 (Nev. June 23, 2016); *LN Mgmt. LLC*
16 *Series 8301 Boseck 228 v. Wells Fargo Bank, N.A.*, No. 64495, 2016 WL 1109295, at *1 (Nev.
17 Mar. 18, 2016) (reversing 2013 dismissal of quiet-title action that concluded contrary to *SFR*
18 *Investments*, reasoning that “the district court’s decision was based on an erroneous interpretation
19 of the controlling law”); *Mackensie Family, LLC v. Wells Fargo Bank, N.A.*, No. 65696, 2016 WL
20 315326, at *1 (Nev. Jan. 22, 2016) (reversing and remanding because “[t]he district court’s
21 conclusion of law contradicts our holding in *SFR Investments Pool 1 v. U.S. Bank*”). Thus, *SFR*
22 *Investments* applies to this case.

23 **IV. Conclusion**

24 In light of the aforementioned, the court finds that BANA has failed to raise a genuine
25 dispute so as to preclude summary judgment in favor of Saticoy Bay on its quiet title claim. Nor
26 has BANA established that it is entitled to summary judgment in their favor. BANA did not tender
27 the amount provided in the notice of default and did not meet its burden to show that no genuine
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1 issues of material fact existed regarding the proper amount of the HOA's lien, Saticoy Bay's bona
2 fide status, or constitutionally sufficient notice.

3 Accordingly, the court will grant Saticoy Bay's motion for summary judgment (ECF No.
4 66) on its quiet title claim against BANA, grant the HOA's motion for summary judgment on
5 BANA's claims against it (ECF No. 67), and deny BANA motion for summary judgment (ECF
6 No. 65).

7 Accordingly,

8 IT IS HEREBY ORDERED, ADJUDGED, and DECREED that BANA's motion for
9 summary judgment (ECF No. 65) be, and the same hereby is, DENIED consistent with the
10 foregoing.

11 IT IS FURTHER ORDERED that Saticoy Bay's motion for summary judgment (ECF No.
12 66) be, and the same hereby is, GRANTED consistent with the foregoing.

13 IT IS FURTHER ORDERED that the HOA's motion for summary judgment (ECF No. 67)
14 be, and the same hereby is, GRANTED consistent with the foregoing.

15 The clerk shall enter judgment accordingly and close the case.

16 DATED April 12, 2017.

17 
18 UNITED STATES DISTRICT JUDGE

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